HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff and Counterclaim Defendant vs. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION Defendant and Counterclaimant.	Case No.: 3:08-cv-05722RJB PLAINTIFF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY RE: COAL TAR CONTAMINATION ORAL ARGUMENT REQUESTED NOTE ON MOTION CALENDAR: June 18, 2010

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On July 31, 2009, after granting partial summary judgment and conducting a bench trial, the Washington Superior Court entered a final judgment in the case of *Pacificorp Env't'l Remediation Co. v. Washington State Dep't of Transportation*, No. 07-2-10404-1 (Pierce County). As set forth in the findings of fact below, the judgment held WSDOT liable under the Washington State Model Toxics Contamination Act ("MTCA") for coal tar releases into the Thea Foss Waterway.

The Superior Court found, and the overwhelming, undisputed evidence establishes, that the Washington State Department of Transportation ("WSDOT") bought, owned, and operated multiple contaminated tracts of land – collectively referred to as the Tacoma Spur Property – adjacent to the Thea Foss Waterway and within the Commencement Bay Nearshore/Tideflats Superfund Site ("CB/NT Site"). Shortly after purchasing the Tacoma Spur Property, WSDOT's initial excavations for the Tacoma Spur project unearthed coal tar contamination. Coal tar

contains compounds of polycyclic aromatic hydrocarbons ("PAHs") and heavy metals that are hazardous substances under MTCA and CERCLA. So WSDOT performed some cleanup work of the property, but with the knowledge that some coal tar would remain. Nevertheless, WSDOT installed a drainage system (the "DA-1 drainage system") on the property, which acted as a pathway for the remaining coal tar and funneled it into the Thea Foss Waterway. Fully aware that the DA-1 drainage system was an ongoing source of PAH contamination to the waterway – and despite repeated requests by the Washington State Department of Ecology ("Ecology") and EPA that WSDOT address the problem – WSDOT took fourteen years after learning coal tar was infiltrating the DA-1 drainage system to cut off that source. The Superior Court found that WSDOT unreasonably delayed its response to the PAH releases from the DA-1 drainage system.

The United States moves for partial summary judgment based on the same undisputed facts that WSDOT was found liable for in state court. These undisputed facts conclusively establish WSDOT's liability under CERCLA Section 107(a)(1) and (a)(2), which impose liability on current owners or operators of a facility "from which there is a release" of a hazardous substance, and owners and operators of such facilities "at the time of disposal" of a hazardous substance. And since the state court judgment and the United States' motion are based on the same undisputed facts and post-trial findings of fact that conclusively established WSDOT's liability under MTCA, WSDOT is precluded from re-litigating these same facts under the doctrine of collateral estoppel.

STATUTORY BACKGROUND

Congress enacted CERCLA in 1980 "to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites," *Pritikin v. Dep't of Energy*, 254 F.3d 791, 794-95 (9th Cir. 2001), while at the same time "'placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes." *WSDOT v. Wash. Natural Gas Co.*, 59 F.3d 793, 799 (9th Cir. 1995). To carry out these goals, CERCLA authorizes the United States to act directly to abate releases of hazardous substances into the environment, and creates a Hazardous Substance Response Trust Fund,

known as the Superfund, to finance federal response actions. 42 U.S.C. § 9604(a); § 9611(a). CERCLA Section 107(a) then authorizes the United States to recover its costs from four classes of responsible parties, three of which are relevant to this motion: (1) current owners or operators of the facility, (2) owners or operators at the time of disposal of hazardous substances at or from the facility, and (3) entities who arrange for disposal of hazardous substances. 42 U.S.C. § 9607(a).

Liability under CERCLA attaches without regard to negligence or culpable conduct. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078 (9th Cir. 2006); *United States v. Monsanto*, 858 F.2d 160, 167 (4th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). Moreover, Congress provided only three affirmative defenses for liable parties under the Act, which are narrowly construed. *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989) (holding that exceptions to CERCLA liability should be narrowly construed to give liberal effect to the Act's remedial purpose); *see also* 42 U.S.C. § 9607(b) (setting forth "act of God," "act of war," and "third party" defenses to liability).

STATEMENT OF UNDISPUTED MATERIAL FACTS

The United States' Complaint sets forth claims against WSDOT for recovery of costs incurred in responding to releases of hazardous substances at the Thea Foss and Wheeler Osgood Waterway problem areas within the CB/NT Superfund Site. These claims are based on two separate sets of facts, the first involving discharge of coal tar by WSDOT from contaminated property that it acquired in connection with highway construction, and the second involving WSDOT's discharge of contaminated runoff from highways that it owns and operates. As this Court is aware, the parties have filed cross-motions for summary judgment on the second set of allegations.

The current motion for partial summary judgment is limited to the first set of allegations. In support of the current motion, the United States' Motion for Partial Summary Judgment re Coal Tar Contamination is based on the following undisputed facts:

The CB/NT Superfund Site

1. The Commencement Bay Nearshore/Tideflats Superfund Site is a 10-12 square mile area in Tacoma, Washington that encompasses shallow water, shoreline, and adjacent land, most of which is highly developed and industrialized. (Decl. of Piper Peterson Lee, ("Peterson Lee Decl.") ¶ 5; Answer of Def. WSDOT, Dkt. # 12, ("Answer") ¶ 11.)

2. Due to widespread contamination of the water, sediments, and upland areas, the Site was listed as one of the ten highest priority hazardous waste sites in the United States in October 1981, and placed on the first proposed National Priorities List in December 1982, which was finalized in 1983. (Peterson Lee Decl. ¶ 10; Answer ¶¶ 12-13.)

3. A 1988 Remedial Investigation and Feasibility Study ("RI/FS") concluded that sediments in the CB/NT Site were contaminated with a large number of hazardous substances. Contaminants of concern – due to their risk of harm to public health, welfare, and the environment – included metals (e.g., arsenic, lead, mercury, and zinc), polychlorinated biphenyls ("PCBs"), and polycyclic aromatic hydrocarbons ("PAHs"). (Peterson Lee Decl. ¶ 11.)

4. Because of the complexity of the Site, the United States Environmental Protection Agency ("EPA") and the Washington State Department of Ecology ("Ecology") divided clean up of the Site into multiple "operable units," including OU1, which dealt with contaminated sediments, and OU5, which dealt with upland sources of contamination into the Bay and its waterways. (Peterson Lee Decl. ¶¶ 10, 13; Answer ¶ 14.) EPA further divided the Site into eight "problem areas" based on location of contaminated sediments. (Peterson Lee Decl. ¶ 14.)

5. Three of the problem areas – the Head of Thea Foss Waterway, the Mouth of the Foss, and the Wheeler-Osgood Waterway – encompass two connected Waterways directly adjacent to downtown Tacoma, and have been managed collectively by EPA and Ecology.[1] (Peterson Lee Decl. ¶ 14.) Remedial investigation of these Waterways identified hundreds of thousands of square yards of sediment contaminated with hazardous substances, including PAHs,

[1] The Thea Foss Waterway was previously referred to as the "City Waterway."

cadmium, copper, lead, mercury, zinc, and phthalates. (Peterson Lee Decl. ¶ 12.)

6. Cleanup of the Thea Foss and Wheeler Osgood Waterways was completed on September 29, 2006. (Peterson Lee Decl. ¶ 19.)

7. EPA has incurred, and continues to incur, unreimbursed costs in responding to releases at the Thea Foss and Wheeler Osgood Waterways problem areas within the CB/NT Superfund Site. (Peterson Lee Decl. ¶¶ 25, 27, 33.)

WSDOT's Ownership and Operation of the Tacoma Spur Property

8. Starting June 22, 1982 and for several years thereafter until at least August 28, 1995, WSDOT purchased parcels of land – the Tacoma Spur Property – approximately 500 feet from the Thea Foss Waterway for use in constructing an urban highway connecter called the SR 705 Tacoma Spur. (WSDOT 30(b)(6) Dep. at 13:1-6, 14:13-15:2, 21:2-6 (Greene Decl.[2] Ex. 1); List of land parcels acquired by WSDOT for SR 705 and SR 509 construction (Ex. 2); Map of SR 705 from Milepost 0.02 to 1.49, Sheet 2 of 8 (Ex. 3); Map of SR 705 from Milepost 0.02 to 1.49, Sheet 3 of 8 (Ex. 4).) The Superior Court found that WSDOT in 1984 bought a plot of land that formerly was part of a manufactured gas plant site. (Findings of Fact and Conclusions of Law, *Pacificorp Environmental Remediation v. WSDOT*, No. 07-2-10404-1 (Ex. 16 at 3).)

9. Despite documents that suggested a "manufactured gas facility was once operated in the approximate location" of the Tacoma Spur Property and physical evidence of coal tar deposits on the property in the form of surface outcroppings and coal tar odors, WSDOT conducted no investigation of the Tacoma Spur Property, conducted no sampling of the property, did not investigate the previous uses of the property, and did not perform an environmental assessment of the property prior to acquisition. (WSDOT 30(b)(6) Dep. at 12:25-18:10 and 16:19-17:22 (Ex. 5); Warranty Deed and Closing Agreement (Ex. 6); Report, "WSDOT Meets the Challenge of Hazardous Substances" (Ex. 7 at 24702221-24).)

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[2] All further exhibits that are given without any other citation or supporting information are supported by the Declaration of Richard Greene.

10. WSDOT has continuously owned the Tacoma Spur Property on behalf of the State since its purchase. (Ex. 1 at 17:8-18:5); Answer ¶ 23; WSDOT's 104(e) Response to EPA admitting ownership (Ex. 8 at CBA216_001429; CBA216_001458); WSDOT petition for review in *WSDOT v. EPA*, 917 F.2d 1309, 1311 (D.C. Cir. 1990) (Ex. 9); Ecology Agreed Order DE 93TC-S166 containing WSDOT's admission of ownership (Ex. 10 at 24011222, ¶ 3); Ecology Agreed Order DE 95TC-S167 containing WSDOT's admission of ownership (Ex. 11 at 24000235, ¶¶ 2-3); WSDOT's 104(e) Response to EPA admitting ownership (Ex. 12 at 24708513).)

11. The Tacoma Spur Property is within the boundaries of the CB/NT Site. (WSDOT's Amended Resp. to RFA No. 5 (Ex. 13); Ex. 8 at THEA-MISC009164, 1429; Ex. 10 at 24011225, ¶ 14; *see also WSDOT v. EPA*, 927 F.2d 1309, 1312 (D.C. Cir. 1990) ("[WSDOT's] Tacoma Spur Property plainly fell within the broad compass of the 1983 Commencement Bay listing.").)

12. In 1984, during drilling conducted for evaluation of the Tacoma Spur foundation requirements, WSDOT's contractor encountered coal tar contamination, including PAHs, left behind by a coal gasification plant that operated on the site between 1884 and 1924. (Report prepared for WSDOT re: subsurface explorations of Tacoma Spur Property (Ex. 14 at 77000026); Ex. 16 at 3.) Historical photos taken prior to the SR 705 construction indicate three very large structures – gas holders for the coal gasification facility – once existed on the property. WSDOT's excavations uncovered at least two of these gas holders, which contained large quantities of coal tar and other materials. (Answer ¶¶ 26-27; Report on Tacoma Spur Property showing locations of gas holders (Ex. 15 at 1298810-0026, THEA-MISC001645).)

13. After discussions with Ecology, WSDOT agreed to remove "readily accessible" coal tar residuals "encountered during construction," excavate two feet below the desired level, and back-fill the location with soil. (Ecology letter of recommendations for WSDOT to excavate the property (Ex. 18 at 24702258, 24702276); WSDOT's Interrog. Resp. Nos. 3 & 4 (Ex. 19); Thompson Dep. at 107:13-25 (Ex. 20); Ex. 16 at 3.) WSDOT subsequently sued three utilities

for contribution under CERCLA. The Ninth Circuit held that WSDOT was not entitled to recover any costs due to a "high degree of inconsistency with the requirements set forth in the NCP [National Contingency Plan]," including the fact that "WSDOT failed to assess accurately both the nature and the extent of the threat posed by the present of PAHs in the soil." *Wash. Natural Gas Co.*, 59 F.3d at 805.

14. Because WSDOT had agreed only to remove contamination "encountered" during excavation, WSDOT and Ecology were aware contamination would remain behind, both on WSDOT's property and within the general area. Thus, Ecology informed WSDOT that the excavation would not constitute a final cleanup action for the Tacoma Spur Property. (Ex. 5 at 24:10-25:24; Ex. 21 at 56:25-60:10; Ex. 18 at 24702258-62, 24702284; Ex. 20 at 27:20-25 to 28:1-13; Ziegler Dep. at 75:22-25 (Ex. 22); WSDOT AG memo stating "everyone involved knew that more contamination remained in areas outside the excavation area." (Ex. 23 at THEA-MISC001308); Transcript of *WSDOT vs. Washington Natural Gas Co. et al.*, No. C-89-415T (Ex. 17 at 741:7-10).)

15. In 1986, as part of the Tacoma Spur project, WSDOT started a project to extend A Street. During excavation for the extension, WSDOT encountered PAH-contaminated soil. (Ex. 16 at 4.)

16. As part of the A Street extension, WSDOT installed the DA-1 drainage system to lower the high water table at the location. (Ex. 16 at 4). The system consisted of two perforated pipes to drain water away from the surface; that connected to three catch basins, which connected to the City-owned 23rd street storm drain by a corrugated metal pipe that emptied into the Thea Foss Waterway via a pair of 96-inch storm drain pipes ("Twin 96ers"). (Answer ¶¶ 34-35; Sawyer Dep. at 13:7-11, 15:9-19:16 (Ex. 24); Diagram of the DA-1 drainage system (Ex. 25); Coleman Dep. at 27:19-29:25 (Ex. 26); July 19, 1995 Revised Interim Action Report for SR 705 prepared for WSDOT (Ex. 27 at 24703858); April 1994 Draft Focused Site Characterization and Interim Remedial Action Evaluation Report showing location of DA-1 line relative to the gas holders (Ex. 28 at 24704522).)

17. The DA-1 drainage system crossed the footprint of the two southern gas holders, in the heart of the historical coal gasification plant operational area. (Ex. 28 at 24704522 (diagram showing location of DA-1 line relative to the gas holders), 24704524 (diagram showing extent of coal tar related contamination); February 1, 1995 Ecology comments on Tacoma Spur Property that "significant NAPL source areas have been identified near the three former gas holder areas" (Ex. 29 at 24009217); WSDOT AG letter to Ecology stating the drainage system "is installed in the area where coal gas storage tanks and deposits of free tar were discovered" (Ex. 30 at THEA-MISC000597).)

18. Before WSDOT installed the DA-1 drainage system, groundwater monitoring reports found that contaminated groundwater from the Tacoma Spur Property had a minimal impact on the Waterway. (Soil and Groundwater Quality Evaluation for SR-705 prepared for WSDOT in 1984 (Ex. 31 at 77000272); *See also* Ex. 18 at 24702292; Anderson Dep. at 95:1-4 (Ex. 32); Ecology letter to WSDOT dated April 9, 2001 stating the "contamination at the [Tacoma Coal Gas] Plant property does not appear to represent a source of NAPL contamination to the Thea Foss Waterway via a groundwater flux pathway" (Ex. 33 at 1304317-0055).)

19. After its installation, the DA-1 drainage system became contaminated with coal tar and other hazardous substances – including PAHs – and transported these substances into the Thea Foss Waterway. (Ex. 13 at Nos. 6 & 7; Ex. 16 at 4, ¶ 6 & at 5, ¶ 14; July 25, 1989 WSDOT memo (Ex. 34).)

20. WSDOT learned the DA-1 drainage system was a potential source of hazardous substances into the Waterway no later than April 1989, when its hazardous waste management consultant, Hart Crowser, informed WSDOT that expanded source control efforts in the Commencement Bay Site could "significantly impact WSDOT at the 21st to 24th Street Site, especially the DA-1 line drain." (April 14, 1989 memo from Hart Crowser to WSDOT (Ex. 40).)

21. In a May 5, 1989 letter, Hart Crowser further reported to WSDOT that the DA-1 line catch basins contained PAHs. (Ex. 41 at Thea-Misc001315.) An internal WSDOT communication in July 1989 indicated that "samples of the outfall from the [DA-1 drainage]

system show significant contamination, which ends up as a pollutant in the City Waterway. This waterway is part of the overall Commencement Bay, Tacoma Tideflats Superfund cleanup site." Hart Crowser recommended that WSDOT plug the underdrain system to prevent additional contamination. (Ex. 34.)

22. WSDOT took no action until 1992, when an Ecology inspector noticed a "whiff of something that really smelled bad" while he was driving by the DA-1 drainage system, and saw "a very considerable sheen on the water that was in the catch basin." (Ex. 26 at 15:3-16). A subsequent WSDOT inspection found "two feet of sludge in the bottom of the catch basin that was heavily contaminated with coal tar." (Ex. 35.) The inspection also noted "a strong coal tar odor has been noticed at the outfall over the last one to two years." (Ex. 35). Ecology sampling of the catch basins at the time found that total PAHs were 1,366,000 ug/kg. (Ex. 37 at HYESD-009883). Other hazardous substances were also found in the sample at elevated levels. (Ex. 36 at 1301344-0003; Ex. 10 at 24011223.)

23. Nevertheless, an internal WSDOT communication dismissed the problem, stating that it "doesn't appear to be a real hot situation at this point," and it was the City of Tacoma, not WSDOT, who took the first steps to stop the DA-1 drainage system from polluting the Thea Foss, by plugging the connections between the french drain pipes and the catch basins in the winter of 1992. (June 3, 1992 internal WSDOT e-mail (Ex. 42); Ex. 13 at Amended RFA No. 10; Ex. 10 at 24011224, ¶ 10.)

24. Despite the City's interim actions, a 1994 study of the site found significant quantities of PAHs in and around the DA-1 drainage system, including carcinogenic PAHs. (Ex. 28 at 24704516, 24704572-74, 24704738-44.) Staining, strong odors, and tar seepage were observed in the vicinity of one of the previously demolished gas holders. (Ex. 28 at 24704546, 49.) The study also determined that one french drain was not plugged. (Ex. 28 at 24704525.)

25. In April 1994, Ecology reiterated to WSDOT that the drainage system was "one of the primary pathways of coal-tar contaminant migration to the waterway." (April 19, 1995 letter from Ecology to WSDOT (Ex. 43 at 24000532.01).)

26. WSDOT made its first attempt to plug the DA-1 drainage system in 1996 – seven years after it learned of the issue – in conjunction with the construction of the SR-509 bridge. At that time, WSDOT removed the connections between the french drain and the catch basins, and plugged the connections with concrete – a process that took one day. (Ex. 27 at 24703858; Ex. 16 at 4, ¶ 8; Schofield Dep. at 41:2-43:25 (Ex. 44).)

27. WSDOT knew before it cut the french drain connection and plugged the pipes with concrete that its work would not completely eliminate contaminant seepage into the DA-1 drainage system. WSDOT's contractor later warned WSDOT that hydrostatic pressure created by removal of the french drain system "has created infiltration into the new drainage structure and storm sewer. This groundwater infiltration appears to be contaminated with coal tar residue and is entering the storm sewer system." (May 1, 1997 WSDOT Record of Telephone Conversation (Ex. 45); *See also* Ex. 24 at 27:3-24, 39:8-18.)

28. As predicted, coal tar continued to infiltrate the DA-1 drainage system. (Ex. 16 at 4, ¶ 8.) The City of Tacoma investigated the drainage system again in 1998, and found strong petroleum odors near the DA-1 line catch basins and black sludge in the system. Sampling results confirmed the contamination consisted of coal tar and PAHs. A TV inspection of the system provided further evidence of contamination within the pipes, and in one section of the system, "only 32 ft. of pipe could be inspected before the tracks on the camera sled began slipping in black oily sludge." The City concluded that coal tar or coal tar-related product was infiltrating the drainage system and that the drainage system was an ongoing point source of PAHs to the Thea Foss Waterway. (Ex. 38 at 1206013-0351 to 1206013-0353.)

29. WSDOT began considering additional options to address the ongoing contamination in 1998, yet did not act. (Ex. 16 at 5, ¶ 12; October 28, 1998 WSDOT Record of Telephone Conversation (Ex. 46)). By 2000, an internal memo revealed that some WSDOT officials were becoming frustrated with lack of attention to the matter. (November 21, 2000 WSDOT Internal Memo re Project Status (Ex. 39 at 24005601).)

30. WSDOT ignored repeated requests from Ecology to stop the discharge of PAHs

to the Waterway from the DA-1 line and also failed to respond to voicemail or email until Ecology "elevated" the request to higher management (Ex. 16 at 5, ¶ 11; Ex. 26 at 131:10-17, 133:3-20.) WSDOT similarly ignored repeated requests by EPA to attend source control meetings discussing DA-1 line issues, and EPA was forced to have "top-level discussions" with WSDOT in an attempt to address its uncooperative behavior. (Flint Decl. ¶ 11-13; *See also* May 10, 1995 letter from EPA to WSDOT (Ex. 47).) WSDOT's "persistent, uncooperative behavior" with Ecology and EPA became a barrier for moving the cleanup project forward in the Waterways. (Ex. 16 at 8, ¶¶3-5.)

31. In March 2003, four years after deciding to consider additional options and fourteen years after it first knew of the PAH problem, WSDOT cut out a section of the corrugated metal pipe that connected the DA-1 catch basins to the 23rd street storm drain and finally disconnected the DA-1 drainage system from the Twin 96ers. (Ex. 16 at 5, ¶ 12; December 18, 2002 internal WSDOT e-mail (Ex. 48); March 6, 2003 letter from WSDOT to City of Tacoma (Ex. 49).) WSDOT observed that the corrugated metal pipe was contaminated with coal tar. (Ex. 24 at 92:24-93:10.) The cost to remove the corrugated metal pipe was approximately $64,000. (Ex. 48.) The total cost of construction for the SR 705 was approximately $100 million and was paid for with state and federal funds. (June 10, 1998 letter from WSDOT to Thea Foss Participants Group (Ex. 50 at 77001656).)

Enforcement Background and State Court Litigation

32. Beginning in 1989 and continuing into the 1990s, EPA sent out four notices of potential liability to WSDOT and other potentially responsible parties ("PRPs") for the Thea Foss and Wheeler Osgood Waterway problem areas. (Peterson Lee Decl. ¶¶ 20-21, 24-25, 27.) The majority of PRPs cooperated with EPA and ultimately entered into two consent decrees for performance and funding of the remedy at the Waterways. (Peterson Lee Decl. ¶¶ 28-30; *see also* Consent Decrees in *United States v. Advance Ross Sub Co., et al,* No.c03-5117RJB (W.D. Wash.) (Ex. 62) & *United States v. Atlantic Richfield Co., et al.*, No. c03-5117RJB (W.D. Wash.) (Ex. 63).) However, WSDOT did not join in these decrees or otherwise agree to perform

cleanup work or pay EPA's response costs. (Peterson Lee Decl. ¶¶ 31-32.)

33. On July 27, 2007, two parties who had cooperated with EPA in conducting the cleanup of the Waterways sued WSDOT in Washington state court for contribution under the MTCA, the state version of CERCLA. (June 27, 2007 Complaint in *Pacificorp et al. v. WSDOT*, No.07-2-10404-1 (Wash. Sup. Ct.) (Ex. 51)); *see also Bird-Johnson Corp. v. Dana Corp.*, 119 Wash. 2d 423, 427 (Wash. 1992) (MTCA was "heavily patterned" after CERCLA and its amendments). Among other claims, the state court complaint alleged that WSDOT was liable for contribution as an owner/operator and an owner/operator at the time of disposal of hazardous substances based on its ownership of the Tacoma Spur Property and the installation and operation of the DA-1 drainage system. (Ex. 51 at ¶¶ 29-30, 32, 36.)

34. On November 10, 2008, the Superior Court granted summary judgment in favor of the plaintiffs with respect to their "claims derived from releases associated with DOT's DA-1 drainage system." (Order granting Puget Sound Energy's and Pacificorp's Motion for Partial Summary Judgment on WSDOT's liability under MCTA (Ex. 52).)

35. On February 5, 2009, after a several-week trial, the state court issued an opinion ordering judgment for the plaintiffs against WSDOT in the amount of $6,000,000, plus attorneys' fees and costs. (February 5, 2009 Memorandum Opinion in *Pacificorp v. WSDOT* (Ex. 53)). The parties subsequently submitted a joint statement of facts and conclusions of law, signed by the court on April 20, 2009. (Ex. 16.) And on July 31, 2009, the state court entered final judgment against WSDOT. (Ex. 54.)

36. The Superior Court found that "significant amounts of coal tar" and "an undetermined amount of PAHs" were released from the DA-1 drainage system to the Thea Foss Waterway. (Ex. 52 at 4; Ex. 16 at 5).

37. The Superior Court found that WSDOT "unreasonably delayed implementing a solution to the releases from the DA-1 line to the Waterway." (Ex. 16 at 5; Ex. 53 at 4).

SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment when the pleadings, discovery, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-32 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Recognizing that summary judgment affords a precise scalpel for eliminating issues over which there is no substantial controversy, courts routinely use partial summary judgment to resolve CERCLA liability issues, while leaving the determination of the amount and recoverability of specific costs for a subsequent phase of action. *See, e.g., United States v. Wash. State Dep't of Transp.*, No. C05-5447RJB, 2006 WL 3327071 (W.D. Wash. Nov. 15, 2006); *Am. Nat. Bank & Trust of Chicago v. Harcros Chems., Inc.*, No. 95C3750, 1997 WL 281295 at *6 (N.D. Ill. May 20, 1997).

ARGUMENT

As described below, the undisputed facts demonstrate that WSDOT is a liable party under CERCLA Section 107(a), both as a current owner of contaminated property and as owner and operator of that property at the time of discharge. Moreover, the Superior Court adjudicated the same issues under the same set of facts regarding the DA-1 drainage system and held WSDOT liable for cleanup costs pursuant to a state law that closely mirrors CERCLA. Accordingly, summary judgment is appropriate.

I. THE UNDISPUTED FACTS ESTABLISH WSDOT'S LIABILITY UNDER SECTION 107(a)(1) AND 107(a)(2).[3]

To establish WSDOT's liability, the United States need only prove that: (1) the Site is a "facility," (2) a release or threatened release of hazardous substances has occurred, (3) the

[3] The arguments presented below do not exhaust the United States' theories of liability. This motion, in an attempt to narrow the issues for discovery and simplify the case, only sets forth liability arguments under 107(a)(1) and 107(a)(2) associated with the Tacoma Spur property and the DA-1 drainage system.

release or threatened release has caused EPA to incur response costs, and (4) WSDOT is a liable party under CERCLA Section 107(a). *United States v. Chapman*, 146 F.3d 1166, 1169 (9th Cir. 1998).

Here, WSDOT has admitted the first three elements in its answer and discovery responses. The fourth element is established by undisputed factual evidence that WSDOT is the current owner of the Tacoma Spur property (which lies within the "facility," the Commencement Bay Superfund Site), and that WSDOT was the owner and operator of that property and of the DA-1 drainage system at the time that system disposed hazardous substances into the Waterway. Indeed, a state court adjudicating the same issues under the same set of facts has already held WSDOT liable for cleanup costs. Accordingly, summary judgment on liability is appropriate. Moreover, a ruling on liability will narrow the scope of litigation, thereby conserving the resources of this Court and of the parties, and may promote settlement discussions.[4]

A. WSDOT Owns Land Within a Superfund Site.

All that is required to establish liability under CERCLA Section 107(a)(1) is evidence that WSDOT is the current owner of "facility" property, regardless of whether WSDOT caused or contributed to a release of hazardous substances. *See Shore Reality*, 759 F.2d at 1044-45; *Monsanto*, 858 F.2d at 168; *R.W. Meyer, Inc.*, 889 F.2d at 1507; *Stringfellow*, 661 F. Supp. at 1063. Moreover, ownership of one portion of a "facility" – whose boundaries are defined by the extent of contamination, not by property lines – is sufficient to establish liability for response costs at that facility as a whole. *Axel Johnson v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 417-419 (4th Cir. 1999) (holding that entire contaminated thirteen acre refinery property operated by defendant was one "facility," and rejecting defendant's argument that each tank and spill area on the property for which it was not responsible was a separate facility under CERCLA); *United States v. Township of Brighton*, 153 F.3d 307, 312-313, 322-23 (6th Cir.

[4] In the event that the Court finds genuine issues of material fact as to any individual element of liability, the United States respectfully requests that the Court enter summary judgment as to those elements not in dispute, pursuant to FRCP 56(d).

1998); *United States v. 150 Acres of Land*, 204 F.3d 698, 707-09 (6th Cir. 2000); *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1431 (E.D. Cal. 1993); *Stringfellow*, 661 F. Supp. at 1059.

Here, WSDOT has admitted on multiple occasions that it purchased the Tacoma Spur Property in the 1980s on behalf of the State of Washington and remains the owner of the property. (Ex. 1 at 12:7-21, 13:2-6, 14:13-17, 17:3-10; Ex. 2; Ex. 3; Ex. 4.) Numerous documents contain its admission including:

- Title documents (Ex. 6);
- WSDOT's 1989 response to EPA's request for information under CERCLA Section 104(e) (Ex. 8 at CBA216_001429);
- WSDOT's 1997 response to EPA's second Section 104(e) request, signed under the penalty of perjury (Ex. 12 at 24708511-13);
- Agreed Orders with Ecology signed by WSDOT officials (Ex. 10 at 24011222; Ex. 11 at 24000235; Ecology Agreed Order, No. DE 95TC-S167 (Ex. 55 at 24011257, 59)); and
- Statements made by WSDOT internally and to regulators and courts. (March 27, 2003 email from WSDOT to Ecology (Ex. 56)); *See generally*, SOF ¶¶ 1-10).

Moreover, the Tacoma Spur Property owned by WSDOT is contaminated with hazardous substances, and it is within the boundaries of a Superfund Site. (SOF ¶¶11, 12, 19.) Thus, WSDOT is liable as a current "owner" of "facility" property under Section 107(a)(1) of the Act.

WSDOT may argue that it is not the "owner" of the Tacoma Spur Property because the State of Washington, not WSDOT, owns highway-related properties. (*See* Answer ¶¶ 22-23.) But this position is completely irrelevant, because WSDOT has already admitted to owning the property during its 30(b)(6) depositions. What's more is this argument, as well as its implied distinction between WSDOT and the State, stands in stark contrast to previous assertions made by WSDOT – not only under penalty of perjury to EPA, but also to the Ninth Circuit, the D.C. Circuit, and the Supreme Court. For example, in a prior cost recovery action arising from WSDOT's excavation of contaminated substances on the Tacoma Spur Property, WSDOT

successfully convinced the Ninth Circuit Court of Appeals that it should be considered the "State" for purposes of CERCLA Section 107(a) analysis. *See* Ex. 57 at 11; *Wash. Natural Gas Co.*59 F.3d at 800 (holding that WSDOT "is the 'state' for purposes of § 9607").

B. WSDOT Owned and Operated Land Within the Commencement Bay Site at the Time of Disposal of Hazardous Substances.

WSDOT's ownership and operation at the time of discharge of the Tacoma Spur Property establishes two additional independent bases for liability under CERCLA Section 107(a). Under Section 107(a)(2), a "person"[5] is liable for response costs if it was the owner or operator of a facility at the time of "disposal" of hazardous substances. 42 U.S.C. § 9607(a)(2). "Disposal" is broadly defined to include the "discharge, deposit, injection... or placing of any... hazardous waste into or on any land or water." 42 U.S.C. §§ 9601, 6903.

As discussed above, WSDOT admits to owning the Tacoma Spur Property from the 1980s to present where they installed the DA-1 line, which created a pathway for coal tar contamination to migrate from the Tacoma Spur Property to the Thea Foss Waterway. *See supra* 15:8-20.

Numerous admissions from WSDOT and its contractors – in addition to regulatory findings based on visual inspections, TV inspections, smoke testing, and sampling data and analysis by Ecology and the City of Tacoma – demonstrate that coal tar contamination discharged from the Tacoma Spur Property to the Thea Foss Waterway. (Ex. 35 (describing "two feet of sludge in the bottom of the [DA-1 line] catch basin that was heavily contaminated with coal tar. The subject catch basin discharges into the nearby Thea Foss Waterway"); Ex. 59 (describing the DA-1 drainage system as a "major source of re-contamination from the site"); Ex. 34 ("samples of the outfall from the system show significant contamination, which ends up as a pollutant in the City waterway"); *see generally* SOF ¶¶ 18, 19.)

As made clear by the Ninth Circuit, this "movement, dispersal, or release" of pre-existing hazardous substances constitutes a "disposal" under CERCLA. *Kaiser Aluminum Chem. Corp.*

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[5] WSDOT has admitted that it is a "person" within the meaning of CERCLA. (Answer ¶ 5.)

v. Catellus Dev. Corp., 976 F.2d 1338, 1342-43 (9th Cir. 1992) (allegations that defendant excavated and spread contaminated soil are sufficient to establish "disposal"); *see also Redev. Agency of City of Stockton v. Burlington N. & Santa Fe Ry. Corp.*, No. Civ. S-05-02087, 2007 WL 1793755, *3 (E.D. Cal. June 19, 2007) ("Re-direction of petroleum contaminants through a french drain is a disposal"); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *United States v. CDMG Realty Co.*, 96 F.3d 706, 719 (3rd Cir. 1996); *Burlington N.R.R. v. Woods Indus., Inc.*, 815 F. Supp. 1384, 1392 n.12 (E.D. Wash. 1993). Thus, WSDOT was an owner at the time of disposal.

In addition, WSDOT was an operator of the Tacoma Spur Property during the period of ongoing disposal by the DA-1 drainage system. WSDOT's activities on the property demonstrate that it was the "operator" of the Tacoma Spur Property under CERCLA: WSDOT installed the DA-1 drainage system (SOF ¶ 16), signed multiple Agreed Orders to address the drainage system contamination (Exs. 10, 11, 55), admitted that removing the corrugated metal pipe was its responsibility (Ex. 24 at 56:6-21), ultimately took action in 2003 to dismantle the system (SOF ¶¶ 29, 31), and thus had control over "the cause of contamination at the time the hazardous substances were released into the environment." *See Kaiser Aluminum*, 976 F.2d at 1341-42 (operator liability attaches to contractor hired to excavate and grade portion of property); *see also United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998) (defining operator as an entity that "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste"). Therefore, WSDOT is liable as an owner and operator of "facility" property at the time of disposal of hazardous substances under Section 107(a)(2).

C. WSDOT's Affirmative Defenses Are Legally Insufficient.

WSDOT may argue that it is entitled to the third party defense to liability under Section 107(b)(3), or that it should not be considered an owner or operator because it qualifies for the "contiguous properties" exception under 42 U.S.C. § 9607(q). (*See* Answer, Affirmative Defenses ¶¶ 6, 7, 10.) WSDOT bears the burden of proof on these affirmative defenses at trial;

thus, at the summary judgment stage, the United States must only "point[] out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. In this case, there is no set of facts that could allow WSDOT to prevail on its affirmative defenses for two basic reasons: WSDOT knew or should have known that the Tacoma Spur Property was contaminated at the time that it purchased the two parcels, and WSDOT actively contributed to the release of hazardous substances from that property.

1. WSDOT Cannot Establish the Third Party Defense.

Under the third party defense, WSDOT must establish "by a preponderance of the evidence" that the release and resulting damages were caused ***solely by*** an act or omission of a third party other than "one whose act or omission occurs in connection with a contractual relationship."[6] 42 U.S.C. § 9607(b)(3) (emphasis added). WSDOT must then demonstrate that it "exercised due care with respect to the hazardous substance concerned" and took "precautions against foreseeable acts or omissions." *Id.*

Here, WSDOT cannot prove that the releases were caused solely by another party, because WSDOT itself caused releases of PAHs and other hazardous substances by installing the DA-1 drainage system, creating what Ecology identified as "one of the primary pathways of coal-tar contaminant migration to the waterway." (Ex. 43 at 24000532.01; SOF ¶¶ 18, 19; *see also* Part I.C, *infra*.) In fact, WSDOT was the only party in charge of construction activities at the Tacoma Spur Property, had purchased and exercised control over the property where the coal tar contamination was present, and installed the DA-1 drainage system in an area where "considerable coal tar contamination" was present. (January 28, 1988 meeting agenda between WSDOT and Hart Crowser (Ex. 60 at 77000653-54)). And, after the DA-1 drainage system was

[6] The current owner of previously contaminated land ordinarily cannot assert a third party defense because the term "contractual relationship" is defined to include "land contacts, deeds, easements… or other instruments transferring titles." 42 U.S.C. § 9601(35)(A); *United States v. Domenic Lombardi Realty, Inc.*, 204 F. Supp. 2d 318, 332 (D.R.I 2002). However, WSDOT argues it is entitled to the exceptions set forth in 42 U.S.C. § 9601(35)(A) for "innocent landowners" and property acquired by eminent domain. Even if WSDOT were able to prove that it falls within these exceptions, its third party defense still fails for the reasons set forth in Part I.D.1, *infra*. Moreover, WSDOT cannot establish that it is an "innocent landowner" because, as described in Part I.D.2, *infra*, it cannot show that it "had no reason to know" of the existence of hazardous substances at the Site. *See* 42 U.S.C. § 9601(35)(A)(i).

installed – as early as April 14, 1989 – WSDOT knew coal tar was seeping into the french drain and catch basins and migrating to the Thea Foss Waterway. (Ex. 40). As stated by the court in *Lewis Operating Corporation,*"[i]f a landowner actively spreads contaminated soil from one area of a [] site to another, as was done here, that landowner has 'released' contaminants onto the land," and is not entitled to the third party defense. *Lewis Operating Corp. v. United States*, 533 F. Supp. 2d 1041, 1046 (C.D. Cal. 2007); *see also Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465 (E.D. Wis. 1994) (denying third party defense because defendant's excavation of site caused barrels of waste to be unearthed and ruptured); *United States v. Honeywell Int'l, Inc.*. 542 F. Supp. 2d 1188, 1201 (E.D. Cal. 2008) (denying third party defense to developer who excavated and graded land, which contributed to the release of hazardous substances).

Nor can WSDOT establish that it exercised due care or took adequate precautions. Due care requires that a defendant "demonstrate that it took necessary steps to prevent foreseeable adverse consequences arising from the pollution at the site," including "those steps necessary to protect the public from a health or environmental threat." *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp 229, 238 (S.D.N.Y. 1994). A defendant whose actions exacerbate the environmental threat cannot satisfy the due care standard. *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 548 (6th Cir. 2001). In this case, not only did WSDOT fail to take precautions against the foreseeable spread of pre-existing soil and groundwater contamination by its DA-1 drainage system, it also took over fourteen years to resolve the problem after being directly informed of its existence and ignoring state and federal requests to address the issue. (SOF ¶¶ 14-31.) This behavior cannot qualify as due care and adequate precaution under the third party defense. *See Franklin County*, 240 F.3d at 548 (no due care where defendant immediately ceased work upon discovering the hazardous substances, but allowed a "significant amount of creosote to migrate approximately forty-five feet, through an open sewer trench."); *Idylwoods Assocs. v. Mader Capital, Inc.*, 956 F. Supp. 410, 419-20 (W.D.N.Y. 1997) (no due care where during a period of "uncooperation and inactivity," the contamination spread to a neighboring creek increasing remediation costs); *Westfarm Assocs.*

Ltd. P'ship v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669, 682-83 (4th Cir. 1995) (rejecting third party defense and holding that "WSSC had the power to abate the foreseeable release of PCE, yet failed to exercise that power.").

2. WSDOT Cannot Establish the "Contiguous Properties" Exception to Owner/Operator Liability.

WSDOT is unable to assert an affirmative defense under 42 U.S.C. § 9607(q). This defense is limited to instances where a property is contaminated "solely by reason" of contamination migrating from a contiguous property. The Tacoma Spur Property was already contaminated before and after WSDOT excavated it. (SOF ¶ 14). And even if this defense was available to WSDOT, it is unable to prove under Section 107(q) that (1) it did not "cause, contribute, or consent to the release or threatened release," (2) it took "reasonable steps" to stop any continuing release, (3) it provided "full cooperation" to authorities, and (4) that at the time that it purchased the property it "conducted all appropriate inquiry" into previous ownership and uses of the property and it "did not know or have reason to know that the property was or could be contaminated by a release or threatened release of hazardous substances" from adjoining properties. 42 U.S.C. § 9607(q).

As described above, WSDOT cannot meet elements (1) or (2) because it actively contributed to the release of hazardous substances from its property, and cannot meet elements (3) or (4) because it allowed the release of hazardous substances from its DA-1 drainage system to continue for several years and failed to cooperate with Ecology and EPA in remedying the problem. (SOF ¶¶ 19-31.) Nor can WSDOT prove by a preponderance of the evidence that it "conducted all appropriate inquiry" into previous ownership and uses of the property and it "did not know or have reason to know that the property was or could be contaminated." At the time of WSDOT's purchase of the first portion, not only was the Tacoma Spur Property located in a heavily industrialized area, but the Commencement Bay Site (including the surrounding industrial area) had already been named one of the ten highest priority hazardous waste sites in the nation. (Peterson Lee Decl. ¶ 10); *see also WSDOT v. EPA*, 917 F.2d 1309, 1312 (D.C. Cir.

1990). Moreover, WSDOT had direct knowledge that a coal gasification plant had operated in the area prior to purchasing the second portion in July of 1984. (*See* Ex. 6 at THEA-MISC001009 ("the parties acknowledge that a manufactured gas facility was once operated in the approximate location of said property"); *cf. In re Hemingway Trans., Inc. v. Kahn*, 174 B.R. 148 (Bankr. D. Mass. 1994) (no innocent landowner defense where defendant failed to seek further information about property despite its close proximity to a Superfund site).[7]

Finally, WSDOT has admitted it conducted *no* inquiries into the previous uses of the property prior to the initial purchase in 1982 (Ex. 5 at 14:10-19, 16:1-p.18:15), let alone conduct "all appropriate inquiries" as required to set forth a defense under 42 U.S.C. § 9607(q). *Cf. Foster v. United States*, 922 F. Supp. 642, 657 (D.D.C. 1996) (plaintiff did not qualify as an innocent landowner where it conducted no inquiry regarding possible contamination at the site at the time of its acquisition in 1985); *United States v. W.R. Grace & Co.*, 280 F. Supp. 2d 1135, 1147-48 (D. Mont. 2002) (no innocent landowner defense established where plaintiff "did not point to facts that show it made any inquiry into the previous ownership and uses of the property, let alone 'all appropriate inquiry.'"). As WSDOT cannot establish any, much less all, of the elements necessary to set forth a defense under Section 107(q), summary judgment on liability is appropriate.

II. WSDOT IS PRECLUDED FROM RELITIGATING ISSUES IT HAS ALREADY TRIED AND LOST IN STATE COURT.

As a final and independent basis for summary judgment, WSDOT has already fully litigated its liability in connection with the Tacoma Spur Property and the DA-1 drainage system in Washington State Superior Court and lost. Under the doctrine of "issue preclusion," the state court's judgment and findings of fact and law are conclusive against WSDOT, and WSDOT is

[7] Very little case law exists on the contiguous properties defense set forth in 42 U.S.C. § 9607(q). Because both Section 107(q) and the innocent landowner defense under Section 101(35)(A)(i) require that the defendant make "all appropriate inquiry" into previous land uses and have "no reason to know" of the contamination, this motion relies on authority applying the innocent landowner defense.

precluded from attempting to re-litigate the same factual issues in this case.[8]

Pursuant to 28 U.S.C. § 1738, which requires federal courts to accord full faith and credit to state court proceedings, federal courts must "give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerge would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *see Albano v. Norwest Financial Hawaii, Inc.*, 244 F.3d 1061, *cert. denied*, 122 S. Ct. 505 (2001); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Under Washington law, when an issue of fact or law is actually litigated and decided by a valid and final judgment, and the decision is essential to the judgment, the resolution of that issue is conclusive as to the losing party in later cases. *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wash. 2d 255, 262-63 (1998). The four criteria to invoke collateral estoppel are: 1) the issue decided in the first action is identical with the one presented in the second action; 2) the first action ended in a final judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party to the first action; and 4) application of the doctrine does not work an injustice. *Id. See also In re Diamond*, 285 F.3d 822, 826 (9th Cir. 2002). This case meets all four criteria.

First, as demonstrated by the pleadings, motion practice, and orders, the material facts presented by this motion are identical to the factual issues resolved by the Superior Court.[9] (Ex. 16 at 3-5 (Superior Court findings of fact regarding the "Tacoma Coal Gas Plant Site" and the "DA-1 line"); Exs. 52-54 (summary judgment order, memorandum opinion, and final judgment).) Second, after entering summary judgment against WSDOT on its liability for the DA-1 drainage system on November 10, 2008, the state court issued its findings of fact and conclusions of law against WSDOT on April 30, 2009. (Ex. 16.) This judgment is sufficient to

[8] The form of issue preclusion relevant here is referred to as non-mutual offensive collateral estoppel. *See generally* C. WRIGHT, A. MILLER & E. COOPER, Federal Practice and Procedure § 4464, at 702-08 (2002).

[9] The Model Toxics Control Act ("MTCA") was "heavily patterned" after CERCLA and its amendments, *Bird-Johnson Corp.*, 119 Wash. 2d at 427, and its liability provisions are virtually identical. *See* WASH. REV. CODE ANN. § 70.105D.04; *see also Asarco Inc. v. Dep't of Ecology*, 145 Wash. 2d 750, 756 (Wash. 2002) ("MTCA was modeled on CERCLA, and we have found CERCLA case law persuasive in interpreting MTCA.").

trigger issue preclusion, despite the existence of an appeal. *Nielson*, 135 Wash. 2d at 264, 956 P.2d at 316; *Riblet v. Ideal Cement Co.*, 57 Wash. 2d 619, 621 (1961). Third, WSDOT was the defendant and was represented by the same counsel in both cases. (*See* Exs. 52-54, and 16.)

And fourth, there is no injustice to WSDOT in preventing them from re-litigating issues that they had a full and fair opportunity to litigate in state court. *See Nielson*, 135 Wash. 2d at 265 ("injustice" inquiry focuses on whether parties in earlier case had "a full and fair opportunity to litigate their claim in a neutral forum"); *see also Albano*, 244 F.3d at 1063 (res judicata applied against party who had opportunity to participate in state court proceedings that led to judgment against party); *Friends of Earth v. Hall*, 693 F. Supp. 904, 920 (W.D. Wash. 1988) (same). In fact, issue preclusion will protect the United States from the burden of re-litigating an identical issue, promote judicial economy by preventing needless litigation, and promote justice by preventing the possibility of an inconsistent judgment. *Five Platters*, 838 F.2d at 329 (by preventing second court from rendering inconsistent judgment, offensive collateral estoppel promotes confidence in the accuracy of judicial determinations). For these reasons, this and other courts have applied collateral estoppel at the request of the United States in CERCLA cases where, as here, the issue of liability had been previously resolved in another action. *E.g.* Order on United States' Mot. for Summ. J. on Defs.' Liability, *United States et. al. v. Alexander et al.*, No. C02-5269RJB (W.D. Wash. 2004); *United States v. Simon Wrecking, Inc*., 481 F. Supp. 2d 363, 368 (E.D. Pa. 2007) (noting that "relitigating liability now would be a waste of judicial resources, requiring this Court to go over exactly the same ground covered in the Contribution Case"); *United States v. Horne*, No. 05-0497, 2006 WL 290591, *2 (W.D. Mo. Feb. 6, 2006); *United States v. Green*, 33 F. Supp. 2d 203, 215-16 (W.D.N.Y. 1998).

WSDOT may argue that the decision in *United States v. Mendoza*, 464 U.S. 154, 159-60 (1984) should be extended to prevent the application of collateral estoppel against a state agency in this case. In *Mendoza*, the Supreme Court held that due to the geographic breadth of government litigation and the nature of issues litigated by the government, "a rule allowing non-mutual collateral estoppel against the government in such cases [involving constitutional issues]

would substantially thwart the development of important questions of law by freezing the first final decision rendered on particular legal issues." *Id*. at 160.

Washington case law, however, has made it clear that the applicability of the *Mendoza* decision in the context of state or local agencies is subject to a case specific determination. *City of Seattle, Executive Servs. Dep't v. Visio Corp.*, 108 Wash. App. 566, 577 (Wash. App. 2001) (holding that collateral estoppel was proper against a local agency and rejecting applicability of *Mendoza*). In this particular case, the policy reasons underlying the *Mendoza* decision simply do not apply because this motion asks the court to apply findings of fact, and not conclusions of law; because those factual findings do not involve questions of policy unique to a government; and because those factual findings do not implicate significant questions of state law. The application of collateral estoppel will not thwart Washington from developing important law or policy. *Mendoza*, 464 U.S. at 162-63. Thus, WSDOT should be precluded from re-litigating its liability for ownership and operation of the Tacoma Spur Property under Washington's well-established doctrine of issue preclusion.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion for Partial Summary Judgment as to the liability of WSDOT under CERCLA Section 107(a)(1) and 107(a)(2).

RESPECTFULLY SUBMITTED,

FOR THE UNITED STATES

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF Participants:

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